Supreme Court, U.S.
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No. 10-92

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In the Supreme Court of the United States

CHRISTINE SAHYERS,

Petitioner,

v.

PRUGH, HOLLIDAY, & KARATINOS, P.L.,
A Florida Limited Liability Corporation,
TIMOTHY PRUGH, JAMES W. HOLLIDAY, II,
THEODORE E. KARATINOS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court has the inherent power to disregard the mandate of a federal statute in order "to promote civility and collegiality among members of its bar," so long as the federal statute does not abrogate such power with "very clear words."

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1-10) is reported at 560 F.3d 1241 (11th Cir. 2009). The February 1, 2008 decision of the United States District Court for the Middle District of Florida, Tampa Division (App. 11-16), was an unreported court order. The opinions of the Eleventh Circuit in favor of and opposing their denial of rehearing en banc (App. 17-38) are reported at 603 F.3d 888 (11th Cir. 2010).

JURISDICTION

The order of the court of appeals denying petitioner's petition for rehearing en banc was filed on April 14, 2010. App. 17. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND PROCEDURAL RULES

Title 29 United States Code, Section 216

. . . .

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees

affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an

> action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.
>
> . . . .

STATEMENT OF THE CASE

This case presents important questions about the nature and scope of the inherent powers of the lower federal courts. The United States Court of Appeals for the Eleventh Circuit's ("Eleventh Circuit") opinions in this case dangerously expand the scope of these powers in several ways. The Eleventh Circuit held that a federal court's inherent powers allow it to disregard a facially applicable federal statute in an effort "to guard and to promote civility and collegiality among the members of its bar" unless Congress "specifically, explicitly, and directly" abrogates that court's inherent power. This decision is clearly at odds with this Court's repeated statement that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Thomas v.*

Arn, 474 U.S. 140, 148 (1985). The Eleventh Circuit's contrary holding "confer[s] on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*, 447 U.S. 727, 737 (1980); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988).

Petitioner Christine Sahyers ("Petitioner") worked as a paralegal for the Florida law firm of Prugh, Holliday, & Karatinos, P.L. During her tenure as a paralegal for the firm Petitioner worked unpaid overtime. Petitioner brought suit in the United States District Court for the Middle District of Florida against the law firm and its owners and principals, attorneys Timothy Prugh, James Holliday, II, and Theodore Karatinos (collectively "Respondents") seeking payment of the unpaid overtime under the Federal Labor Standards Act ("FLSA"). Respondents denied all liability in their Answer and throughout the litigation.

After the completion of discovery, the district court ordered Petitioner and Respondents to engage in pre-trial mediation. The September 12, 2007 mediation ended in an impasse. Respondents then presented Petitioner with an offer of judgment pursuant to Fed. R. Civ. P. 68. Under Rule 68, defendants may make a formal offer to allow judgment to be entered against them. If the plaintiff does not accept the offer and later obtains a judgment less favorable than the offer, the plaintiff must pay the

costs incurred after the offer was made. *See* Fed. R. Civ. P. 68.

In their Offer of Judgment, Respondents agreed to pay Petitioner $3,500.00, which included "all wages which the [Petitioner] claims to be owed to her by the [Respondents], as well as a sum of liquidated damages equal to the total amount of wages." Respondents' Offer of Judgment stated that the offer "does not in any way act as an admission of liability or wrongdoing on the part of the Defendants." Respondents agreed to pay "judgment for any amount of costs and attorney's fees, if any, to which the Court determines the [Petitioner]'s entitlement. . . ."

On October 1, 2007, Petitioner accepted the Respondents' Offer of Judgment. On October 9, 2007, the district court entered judgment for Petitioner and against Respondents in the amount of $3,500.00. Petitioner timely moved the district court to tax attorney's fees and expenses against Respondents pursuant to 29 U.S.C. § 216(b), the attorney's fee provision of the FLSA.

Acting on its own, the district court scheduled oral argument on the fees issue for January 24, 2008. Attorney for Respondents opened the argument by stating that "this is, above all, a case that should have never been brought and didn't have to be brought. The Defendant in this case – the Defendants were lawyers in a law firm. They employed a person who had graduated from law school but had not yet taken and passed the bar. She was performing legal

services, paralegal and above, in terms of that kind of nature."

The district judge's first question to Petitioner's counsel (asked moments after Petitioner's counsel began speaking) followed up on Respondent's argument: "Well, let's start with their first argument, which is this never should have been a lawsuit in the first place because you never wrote a letter, you never asked for a certain amount of dollars."

Petitioner's counsel pointed out to the district judge that the FLSA does not require advance notice and that Congress would have to create a statutory requirement for such notice. Petitioner's counsel also informed the trial judge that Petitioner had made an oral demand to Respondents for the unpaid overtime that she was owed. When Petitioner's counsel pointed out that an award of attorney's fees to a successful party is mandatory under the FLSA, the trial judge responded that the award of attorney's fees would "depend on whether I made a finding that the fees were not reasonable and necessary since the lawsuit itself wasn't necessary."

On February 1, 2008, the district court denied Petitioner's motion and refused to award any attorney's fees or costs. App. 16. In its order, the district court acknowledged that Petitioner was the prevailing party under Eleventh Circuit law and that the FLSA "provides for a mandatory award of reasonable attorney's fees" for such a prevailing party. However, despite the requirements of the FLSA, the

district court refused to grant Petitioner payment of attorney's fees. The district court stated that "[Petitioner's] lawyer did not even make a phone call to try to resolve the issue before filing suit. The [Respondent] is a law firm. Prior to filing suit in this local area, it is still reasonable to pick up the phone and call another lawyer so it won't be necessary to file suit." Neither the transcript from the oral argument nor the Order mention "bad faith," "inherent powers," or "sanctions."

Petitioner filed a timely notice of appeal to the Eleventh Circuit. In the appeal Petitioner asserted that as a prevailing party she was entitled to reasonable attorneys' fees. Petitioner further argued that it was improper for the district court to create an exception to a generally applicable statute such as the FLSA that would apply only to lawyers. Neither Petitioner nor Respondents' briefs treated the case as an inherent powers or bad faith sanctions case.

On March 3, 2009, the Eleventh Circuit upheld the district court's denial of attorneys' fees and expenses. App. 1-10. The Eleventh Circuit admitted that a successful party would "[i]n general" be entitled to attorney's fees under the FLSA, but found an "exception" to the FLSA's otherwise mandatory fee requirement:

> In general, a prevailing FLSA plaintiff is entitled to an award of some reasonable attorney's fees and costs. 29 U.S.C. § 216(b); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223 n.12 (11th Cir. 2007); *Kreager v. Solomon &*

> *Flanagan, P.A.*, 775 F.2d 1541, 1542 (11th Cir. 1985). But the district court treated this case as an exception to that rule by finding that a reasonable fee and cost award here was zero. The district court, in substance, based this exception on its inherent powers to supervise the conduct of the lawyers who come before it and to keep in proper condition the legal community of which the courts are a leading part.

App. 5. The Eleventh Circuit panel opinion contains the first mention of inherent powers as the explanation for the district court's denial of fees.

The panel opinion included a general discussion of inherent powers and mentioned a new source of inherent authority for Federal courts, the authority "to guard and to promote civility and collegiality among the members of its bar." App. 6 (footnote omitted). Based partially on this new power, the court upheld the district court's exercise of its inherent powers in this case:

> The district court's inherent powers support its decision here. Defendants are lawyers and their law firm. And the lawyer for Plaintiff made absolutely no effort – no phone call; no email; no letter – to inform them of Plaintiff's impending claim much less to resolve this dispute before filing suit. Plaintiff's lawyer slavishly followed his client's instructions and – without a word to

> Defendants in advance – just sued his fellow lawyers.

App. 7 (footnotes omitted).

The panel opinion attempted to square its decision with the FLSA's mandatory fees requirement by arguing that Congress must explicitly abrogate a federal court's inherent powers on fees:

> Congress was aware of the inherent powers of a federal court when enacting the FLSA. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) ("We assume that Congress is aware of existing law when it passes legislation."). And at least in the absence of very clear words from Congress, we do not presume that a statute supersedes the customary powers of a court to govern the practice of lawyers in litigation before it.

App. 7 n.6.

The panel closed by noting that it "put aside cases in which lawyers are not parties. We do not say that pre-suit notice is usually required or even often required under the FLSA to receive an award of attorney's fees or costs." App. 9.

The Petitioner timely filed for en banc rehearing. On April 14, 2010 the Eleventh Circuit denied the request and filed three published opinions with the denial. The first opinion, by the judge who had drafted the panel opinion, concurred in the denial. The concurrence reiterates the reasoning of the panel opinion and argues that inherent powers

"supplement" the FLSA's otherwise mandatory fees requirement: "I see the Courts' inherent powers over Bar members as a separate and pre-existing font of law and legal authority that specifically governs the conduct of lawyers as lawyers, regardless of the outcome of the case." App. 19 (emphasis omitted).

The concurrence states that inherent powers can "supplement" and contradict an otherwise unambiguous congressional statement unless Congress explicitly abrogates those powers:

> Congressional abrogation of traditional Court powers ought not to be lightly assumed. And I maintain it is by no means clear that Congress intended that the FLSA in any way interfere with the Courts' traditional supervisory powers over the course of litigation and over lawyer conduct, although Congress did intend for fees to be assessed against defendants ordinarily when the plaintiff obtains a winning outcome. I believe I am correct to say that Congressional abrogation of the Court's inherent power to supervise lawyer conduct must be clear and plain, before the Courts let that critical power get away.

App. 21 (citation omitted).

The concurrence also reiterates that the inherent power at issue is the authority to govern the behavior of the bar at large: "Courts have the inherent and main – if not exclusive – authority (along with the duty and responsibility) to supervise their Bar

members." The concurrence defends the special treatment of lawyers by reference to Florida Bar Rules:

> As the Preamble to the Rules Regulating the Florida Bar observes, a lawyer should demonstrate respect for other lawyers. Given that the defendants in this case were a law firm and lawyers sued individually by a plaintiff represented by a lawyer from the same local area, the District Court in this case was attempting to supervise its Bar and to protect civility and respect among the area's lawyers. The District Judge specifically tied his decision to the local practices: "prior to filing suit in this local area, it is still reasonable to pick up the phone and call another lawyer so it won't be necessary to file suit."

App. 22.

There were two opinions dissenting from the denial of rehearing en banc. Judge Barkett's dissent notes that it is black letter law that inherent supervisory powers cannot supersede a plain statutory requirement:

> En banc review is warranted in this case because district courts do not have the power, inherent or otherwise, to directly contravene a federal statute. The panel decision, holding that the district court could deny attorneys' fees mandated by the Fair Labor Standards Act ("FLSA"), is contrary to settled United States Supreme Court

> precedent providing that the use of a district court's inherent supervisory powers is invalid when it conflicts with a statutory command. *See, e.g. Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988); *Thomas v. Arn*, 474 U.S. 140, 148 (1985).

App. 23 (part of citation omitted).

Judge Wilson's separate dissent notes that federal courts do not have "the inherent authority to ignore and override a statutory mandate in the interest of promoting a professional courtesy." App. 26. Judge Wilson explains at length that the FLSA is a mandatory fee statute under Eleventh Circuit and Supreme Court case law, quoting Eleventh Circuit precedent that "prevailing plaintiffs are *automatically entitled* to attorneys' fees and costs under the FLSA." App. 30 (quoting *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223 n.12 (11th Cir. 2007)) (emphasis in original).

Judge Wilson notes the potential ramifications of this new formulation of inherent authority:

> While it is desirable to encourage lawyer collegiality and to discourage unnecessary litigation, I do not believe that we can rewrite a statute to conform with certain policy preferences. The *Sahyers* opinion provides binding precedent for a district court to ignore a clear Congressional mandate from a federal statute based on its "inherent powers." Such precedent oversteps

> the boundaries of our proper duty as neutral arbiters and obviates the role of Congress.

App. 31 (citation omitted).

Judge Wilson also expressed concern over "the precedent this case now creates: It is now within the discretion of district courts in our Circuit to deny attorney's fees to lawyers who fail to extend professional courtesies to lawyer-defendants in FLSA and (presumably other) civil rights cases." App. 37. Moreover, the "special circumstances" exception to the FLSA appears to be blatant favoritism from a federal court to law firms:

> Finally, I am troubled by the implication that lawyers are entitled to exclusive treatment under the FLSA. Although the *Sahyers* opinion states that it does not intend to create a new rule of pre-suit notice in FLSA cases where the defendant is a law firm or a lawyer, such language will surely fall on deaf ears in this Circuit (as it should) in light of the fact that *Sahyers* is a published opinion, which makes it binding precedent in this Circuit. Section 216(b) pays no attention to the occupation of the defendants. Neither should we. The *Sahyers* opinion has unintentionally created a new rule that a plaintiff's failure to give pre-suit notice to a lawyer-defendant in an FLSA case may forfeit the plaintiff's otherwise statutory right to attorneys' fees and costs. Courts within this Circuit will rely on *Sahyers* and will interpret it as creating a discretionary

> exception to a mandatory fee statute. In point of fact, courts both within this Circuit and outside of this Circuit have already followed suit, recognizing, but not yet applying, the proposition that no fee can be a reasonable fee under the FLSA when a plaintiff fails to give pre-suit notice to a lawyer-defendant.

App. 34-35 (citations omitted).

REASONS FOR GRANTING THE WRIT

This Court has been extremely careful to delineate the inherent powers of federal courts, limiting the powers to those that "are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812).

Nevertheless, in this case the Eleventh Circuit has held that its inherent powers allow it to disregard the plain language of the FLSA's mandatory fees clause in an effort "to guard and to promote civility and collegiality among the members of its bar." App. 6. The Eleventh Circuit suggests that Congress is "aware of the inherent powers of a federal court when enacting" legislation and thus those powers will supersede any congressional act barring "very clear words" abrogating these inherent powers. App. 7 n.6. The later concurrence requires that Congress "specifically, explicitly, and directly" state an abrogation of inherent powers before a federal court should honor congressional intent. App. 21. This

holding grossly over-reads the reach and purpose of the inherent authority doctrine, flies in the face of precedents from this Court and other courts of appeal, and replaces clear congressional intent with judicial fiat.

I. The Opinions Below Dangerously Overstate the Scope and Nature of Federal Court Inherent Authority.

In this case the Eleventh Circuit holds that unless Congress uses very clear words to specifically, explicitly, and directly abrogate a court's inherent powers a federal court can disregard otherwise applicable federal law. In this case the FLSA's fee provision was mandatory and a federal court has no power to ignore a clearly applicable act of Congress under the inherent powers doctrine.

As Judge Barkett's dissent notes "there is no dispute that the language of the [FLSA] is mandatory" and "has been previously so construed" by the Eleventh Circuit. App. 23-24. The FLSA provides that "[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). The use of the word "shall" rather than "may" directs that a fee award is mandatory. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415-16 & nn.5 & 6 (1978). This mandatory fee clause does not require pre-suit notice; nor does it have any

exception for law firms or lawyers who violate the FLSA.

Both the district court and the Eleventh Circuit panel found (or assumed) that petitioner was the prevailing party. As such, the district court should have performed the traditional lodestar analysis and awarded a fee to petitioner's attorney. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Norman v. Housing Auth.*, 836 F.2d 1292, 1299 (11th Cir. 1988). Nonetheless, the Eleventh Circuit held that a federal court could ignore this plain statutory requirement as an exercise of an inherent authority "to keep in proper condition the legal community of which the courts are a leading part." App. 5.

This holding disregarded multiple holdings of this Court stating that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Thomas v. Arn*, 474 U.S. at 148 (1985). To allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*, 447 U.S. 727, 737 (1980); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988).

"Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). *Degen v.*

United States well explains the rationale for such restraint:

> The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). In many instances the inherent powers of the courts may be controlled or overridden by statute or rule. *Carlisle v. United States*, 517 U.S. 416, 426 (1996); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). Principles of deference counsel restraint in resorting to inherent power, *Chambers v. NASCO*, *supra*, at 44, and require its use to be a reasonable response to the problems and needs that provoke it.

Degen v. United States, 517 U.S. 820, 823-24 (1996).

Several cases show this principle in action. In *United States v. Payner* this Court rejected a district court's decision to suppress the fruit of an illegal search that would not have been suppressed under this Court's existing Fourth Amendment jurisprudence. "Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. We hold that the supervisory power does not extend so far." *Payner*, 447 U.S. at 737.

Likewise, in *Bank of Nova Scotia v. United States* the district court attempted to use its inherent powers to circumvent the harmless-error inquiry required by Federal Rule of Criminal Procedure 52(a). The Court quoted the above from *Payner* and reiterated that "it is well established that '[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.'" *Bank of Nova Scotia*, 487 U.S. at 254 (quoting *Thomas*, 474 U.S. at 148. Thus, a federal court could not simply choose not to follow an otherwise valid Rule of Criminal Procedure under its inherent powers:

> It follows that Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions. The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked "because a court has elected to analyze the question under the supervisory power."

Bank of Nova Scotia, 487 U.S. at 255 (quoting *Payner*, 447 U.S. at 736).

In *Carlisle v. United States*, 517 U.S. 416 (1996), the district court granted a defendant's untimely post-verdict judgment of acquittal in violation of the express terms of Rule 29 of the Federal Rules of Criminal Procedure. The Court recognized that

pursuant to their inherent powers, federal courts "'may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress'. Whatever the scope of this 'inherent power,' however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle*, 517 U.S. at 426 (quoting *United States v. Hastings*, 461 U.S. 499, 505 (1983)). This was especially so "because of the clarity of the text." *Carlisle*, 517 U.S. at 426. These cases all stand for a single, quite clear proposition: a federal court may not use its inherent powers to contradict or evade an otherwise applicable statute or rule.

This case is on all fours with *Bank of Nova Scotia*, *Payner*, and *Carlisle*: the district court and the Eleventh Circuit have chosen to disregard "the balance struck" by Congress in the mandatory fee provision of the FLSA and to ignore clear statutory language. Just as in *Bank of Nova Scotia*, *Payner*, and *Carlisle*, it is not acceptable for a court to disguise blatant illegality with an alleged exercise of inherent power.

The Eleventh Circuit attempts to hide this error by stating that any statute or rule must "specifically, explicitly and directly" abrogate inherent judicial powers or be subject to judicial override. App. 21; *see also* App. 7 n.6 (requiring "very clear words from Congress" before a court will find that a statute controls over "the customary powers of a court"). Under the Eleventh Circuit's reasoning every

congressional action that does not explicitly abrogate the inherent power of the federal courts is open to question, because Congress must now use "very clear words" or risk a federal court ignoring the plain intent of its statutes.

The FLSA is crystal clear that fees are required when a plaintiff is successful. *See* 29 U.S.C. § 216(b); *Christiansburg Garment Co.*, 434 U.S. at 415-16 & nn.5 & 6. The FLSA has no exception for lawyers or law firms. Thus, the congressional intent in this case is incontrovertable. Nevertheless, the Eleventh Circuit requires Congress to explicitly state that "in a conflict between the FLSA and a court's inherent powers, the FLSA controls." Because Congress did not do so any federal court is free to exercise its powers regardless of the opposing congressional act or rule. A Westlaw search of the U.S. Code establishes that Congress has never spoken so clearly.[1] Thus, under the Eleventh Circuit's reasoning any current congressional act must bend to a court's inherent power.

The Eleventh Circuit attempts to justify this over-stringent standard by citing to *Chambers*. In *Chambers* this Court held that Congress did not displace the inherent power to charge attorneys or

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[1] A search of the Westlaw database "USC" for the terms "inherent power" /s court returns 29 documents, almost all of them from the Federal Rules of Civil or Criminal Procedure and none explicitly abrogating inherent authority in the manner suggested by the Eleventh Circuit.

parties guilty of bad faith in litigation with attorneys fees when it passed 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure. *Chambers*, 501 U.S. at 46-47. The Court found that Congress did not intend to displace the traditional sanctioning powers of the courts and that neither § 1927 nor Rule 11 would reach the bulk of the bad faith conduct at issue in the case. *Id.* The Court did note that it would not "lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power." *Id.* at 47. Nevertheless, *Chambers* certainly did not require congressional language as stringent as that suggested by the Eleventh Circuit. To the contrary, *Chambers* notes that the existing case law, the plain language of the Rules and § 1927, and the history behind those enactments supported a congressional intent to supplement and preserve the inherent authority to sanction, not displace it. *Id.* at 47-51. Thus, *Chambers* does not allow a federal court to disregard clearly applicable law, as suggested by the Eleventh Circuit. App. 1. As noted above, such a suggestion is inconsistent with *Bank of Nova Scotia*, *Payner*, and *Carlisle*. Instead, *Chambers* allows inherent powers and statutory law to co-exist; it does not grant courts the power to ignore clearly applicable law.

Moreover, *Carlisle* specifically forecloses the Eleventh Circuit's reading of *Chambers*. *Carlisle* notes that although this Court would not "lightly assume" that Congress has displaced inherent powers, it would do so in *Carlisle* "because of the

clarity of the text." *Carlisle*, 517 U.S. at 426. Thus, *Carlisle* makes clear that in the face of clearly applicable federal law there is no room for a contrary exercise of inherent powers.

II. This Decision Creates a Circuit Split on Whether Inherent Powers Can Override a Clear Act of Congress or a Contrary Rule of Procedure.

This decision also places the Eleventh Circuit in square conflict with cases in at least five other Circuits recognizing that a federal court's inherent powers cannot override a clear act of Congress or a contrary federal rule of procedure. Judge Posner's description of the nature and scope of inherent authority from *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 390-91 (2d Cir. 2002) is instructive:

> The inherent authority of federal courts to punish misconduct before them is not a grant of authority to do good, rectify shortcomings of the common law (as by using an award of attorneys' fees to make up for an absence that the judge may deem regrettable of punitive damages for certain breaches of contract), or undermine the American rule on the award of attorneys' fees to the prevailing party in the absence of statute. *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1318 (10th Cir. 2000); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.*, 976 F.2d 541, 548-50 (9th

> Cir. 1992); *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226, 1232-33 and n.9 (6th Cir. 1984) (en banc). These cases and others we could cite make clear that it is a residual authority, to be exercised sparingly, to punish misconduct (1) occurring in the litigation itself, not in the events giving rise to the litigation (for then the punishment would be a product of substantive law-designed, for example, to deter breaches of contract), and (2) not adequately dealt with by other rules, most pertinently here Rules 11 and 37 of the Federal Rules of Civil Procedure.

Judge Easterbook has likewise noted that "[t]he supervisory power is part of the common law, and no court has a common law power to disregard a rule or statute that was within the authority of Congress to enact." *United States v. Widgery*, 778 F.2d 325, 329 (7th Cir. 1985); *see also United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991) (Kozinski, J.) ("The supervisory power simply does not give the courts the authority to make up the rules as they go, imposing limits on the executive according to whim or will.").

Cases from other Circuits are in accord. *See, e.g., In re United States*, 426 F.3d 1, 9 (1st Cir. 2005) ("The court's supervisory power does not license it to ignore an otherwise valid existing jury plan or to bypass the mechanism provided by statute to alter such plan."); *United States v. Thorpe*, 471 F.3d 652, 665 (6th Cir. 2006) (rejecting the district court's grant of discovery based upon a claim of inherent power that

disregarded contrary statutory and Supreme Court law); *Atchison, Topeka and Santa Fe Ry. Co. v. Hercules, Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998) (rejecting a district court's dismissal of an action as inconsistent with the Federal Rules and "join[ing] other circuits in holding that district courts have inherent power to control their dockets, but not when its exercise would nullify the procedural choices reserved to parties under the federal rules"); *United States v. Washington*, 549 F.3d 905, 912-14 (3d Cir. 2008) (rejecting argument that a district court has an inherent power to vacate its own criminal judgments because of fraud because 18 U.S.C. § 3582(c) and Federal Rule of Criminal Procedure 35 circumscribe such a power).

The Second Circuit has argued in dicta, in accord with the Eleventh Circuit, that the language quoted above from *Chambers* allows a court to disregard a clearly applicable federal statute. *See Lin v. U.S. De'pt of Justice*, 473 F.3d 48, 53 (2d Cir. 2007). In *Lin* the Second Circuit addressed 8 U.S.C. § 1252(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which explicitly stripped federal courts of the power to remand cases to the Bureau of Immigration appeals for the taking of additional evidence. *Lin*, 473 F.3d at 52. Without relying upon its inherent powers in its decision, the *Lin* court opined that despite clear congressional intent to bar remand, a court could in fact remand under its inherent authority. *Id.* at 52-55. Because all parties agreed on a remand the court did not need to

reach the inherent powers question. *Id.* The Second Circuit has since cast doubt upon this discussion, *see Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 261-62 (2d Cir. 2007), and other circuits have likewise declined to follow it. *See Wan Ping Lin v. Mukasey*, 303 Fed. Appx. 465, 468 (9th Cir. 2008); *Zhen Jiang v. Att'y Gen. of U.S.*, 324 Fed. Appx. 196, 198 n.4 (3d Cir. 2009). Nevertheless, *Lin* helps show the danger of the Eleventh Circuit's reasoning in this case. *Lin* and *Sahyers* use inherent powers to flatly disregard applicable law, a clear misunderstanding of the nature of inherent powers and a grave disrespect for Congress' legislative role and authority.

In essence these various cases present two different tests when an exercise of inherent power conflicts with a rule or statute. Five Circuits ask whether an exercise of inherent authority would conflict with the clear words of a federal statute. If so, the statute controls. *Lin* and *Sahyers* ask whether the statute at issue clearly abrogates the claimed inherent authority. On the surface these tests sound similar. Nevertheless, in this case (and many others) the choice of test is outcome determinative and the tests are actually markedly distinct in what they require of Congress. The majority of Circuits simply ask what a statute clearly requires. *Lin* and *Sahyers* ask what the statute requires *and* whether Congress has gone out of its way to abrogate inherent authority with a clear statement.

III. Federal Courts Do Not Have Inherent Power to Regulate the Bar at Large or to Enforce Out of Court Professional Courtesies.

The inherent powers of federal courts are limited to those powers that "cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Hudson*, 7 Cranch at 34. "The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Degen*, 517 U.S. at 823.

The Eleventh Circuit decision over-reads the purpose of the inherent powers of federal courts. The Eleventh Circuit held that the district court action here was pursuant to "its inherent powers to supervise the conduct of the lawyers who come before it and to keep in proper condition the legal community of which the courts are a leading part." App. 5. Likewise, the court claims that the inherent powers encompass "among other things, the authority to police lawyer conduct and to guard and to promote civility and collegiality among the members of its bar." App. 6. The court claims a general "power of oversight for the bar." Id. The denial of rehearing concurrence states that "Courts have the inherent and main – if not exclusive – authority (along with duty and responsibility) to supervise their Bar members." App. 20.

The concurrence cites to the Preamble to the Rules Regulating the Florida Bar and argues that "the District Court in this case was attempting to supervise its Bar and to protect civility and respect among the area's lawyers." App. 22. Note the exceptional nature of the citation to the Preamble to the Rules Regulating the Florida Bar. This is a section of the Rules that may not be enforceable by a state court at all, *see* Preamble to the Rules Regulating the Florida Bar, R. Regulating Fla. Bar 4, Preamble (2010) ("The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability"), and here the concurrence is suggesting that a federal court can use its inherent powers to enforce this general and non-binding language.

In defense of this proposition the Eleventh Circuit offers the following: "We believe and defend the idea that maintaining a bar that promotes civility and collegiality is in the public interest and greatly advances judicial efficiency: better 'to secure the just, speedy and inexpensive determination of every action and proceeding,' as Rule 1 demands. For background, *see* Fed. R. Civ. P. 1." App. 23; App 6 n.5.

Despite this defense of its policy preference, it is critical to note the vast expansion of federal inherent power suggested by the court. It is black letter law and obvious that a federal court can "discipline attorneys who appear before it" (meaning the attorneys actually present in court) or that a court can control admission to its bar. *See, e.g., Chambers*,

501 U.S. at 43-44. Nevertheless, this power certainly does not stretch to a general power to control civility or lawyer relations among the entire legal community surrounding a federal court. *See Zapata Hermanos*, 313 F.3d at 390-91 (Posner, J.) (holding that inherent authority should be "exercised sparingly" to punish misconduct occurring "in the litigation itself, not in the events giving rise to the litigation"); *Bank of Nova Scotia*, 487 U.S. at 264 (Scalia, J., concurring) ("Even less do I see a basis for any court's 'supervisory powers to discipline the prosecutors of its jurisdiction,' except insofar as concerns their performance before the court and their qualifications to be members of the court's bar.") (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)).

Ex Parte Robinson is instructive. In *Robinson* this Court upheld congressional power to "limit and define" the contempt power in the lower courts. *Ex Parte Robinson*, 19 Wall. 505, 510 (1874). There was "no question" as to the validity of this congressional action because "[t]hese courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction." *Id.* at 511. Because the Supreme Court is the only court Article III requires, the inherent powers of district courts should be extremely limited when they are in opposition to an act of Congress.

As early as 1866 this Court recognized that "the legislature may undoubtedly prescribe qualifications for the office" of lawyer. *Ex Parte Garland*, 71 U.S.

333, 379 (1866). If this Court has accepted legislative control over admission to practice, a much larger imposition upon federal court operation than bar civility, it cannot be true that a federal court has the power to disregard an act of Congress in the cause of bar civility. *Cf.* Charles W. Wolfram, MODERN LEGAL ETHICS 32 (1986) (arguing that "no unreversed federal decision" has claimed such a broad version of inherent power).

IV. It Is Improper for a Federal Court to Create a Lawyers-Only Exception to the FLSA or any Other Federal Statute.

Even if the Eleventh Circuit is correct on the scope and nature of inherent authority, it is inappropriate for a federal court to create an exception to an otherwise neutral fees statute for law firms. The district court in this case based its decision to deny fees upon the failure of counsel for Petitioner to call or write Respondent lawyers before filing suit in this action, regardless of the fact that the FLSA includes no such requirement. The Eleventh Circuit is quite explicit that the new rule in *Sahyers* is for lawyers only: "We put aside cases in which lawyers are not parties." App. 9. In defending this action as an effort to encourage bar civility the Eleventh Circuit makes matters worse. Now there is a lawyers-only exception to the FLSA that is justified by a lawyers-only inherent power.

Consider, by analogy, *Heintz v. Jenkins*, 514 U.S. 291 (1995). In *Heintz* this Court rejected a "litigation exception" for lawyers to the Fair Debt Collection Practices Act ("FDCPA"), because neither the plain language nor the congressional intent behind the FDCPA supported a special exception for lawyers or litigation. *Id.* at 294-95. Similarly, in *Jerman v. Carlisle,* 130 S.Ct. 1605, 1621 (2010), this Court refused to grant a mistake-of-law defense to the FDCPA despite an explicit claim that because of their roles as advocates lawyers need special treatment. *See also Montejo v. Louisiana*, 129 S.Ct. 2079, 2087 (2009) (noting that "the Constitution does not codify the ABA's Model Rules" and refusing to suppress any confessions garnered by the Police after appointment of a lawyer).[2]

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[2] Near the end of the panel opinion, the Eleventh Circuit analogized the district court's invocation of inherent authority here to an "informal sanction" for "conscious indifference to lawyer-to-lawyer collegiality." App. 9 n.9. To the extent that invoking this type of inherent authority really should be characterized a sanction, it was doubly illegitimate, for the court never provided the plaintiff's attorneys with notice or an opportunity to be heard. As this Court has explained, "except where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defence." *Bradley v. Fisher*, 80 U.S. 335, 354 (1871); *see also Roadway Express*, 447 U.S. at 767 ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."); Daniel H. Fehderau,

(Continued on following page)

V. The Issues in This Case Are of Exceptional National Importance.

The facts are not disputed and the Eleventh Circuit's statement of the nature of federal inherent power is dangerous, incorrect, and likely to have a national impact as federal courts apply a newly found "inherent and main – if not exclusive – authority (along with their duty and responsibility) to supervise their bar members." App. 20. Moreover, this power will trump any rule or statute that does not explicitly disclaim federal court inherent authority.

Sahyers has already been cited by ten federal courts both inside and outside the Eleventh Circuit[3]

Rule 11 and the Court's Inherent Power to Shift Attorney's Fees: An Analysis of Their Competing Objectives and Applications, 33 SANTA CLARA L. REV. 701, 708-9 (1993); Fed. R. Civ. P. 83(b).

[3] *Munoz v. Kobi Karp Arch. & Interior*, No. 09-21273-CIV, 2010 WL 2243795, at *3 n.1 (S.D. Fla. May 13, 2010) (stating *Sahyers* rule that pre-suit notice may be necessary when suing a law firm); *Dees v. Hydradry, Inc.*, No. 8:09-cv-1405-T-23TBM, 2010 WL 1539813, at *5 n.10 (M.D. Fla. April 19, 2010) (noting that *Sahyers* must be incorrect because "the parties [in *Sahyers*] could not effectively compromise the claim before suit" because "the FLSA prohibits unsupervised, private compromise. In other words, even though the parties lacked the capacity to compromise the dispute without resort to judicial approval, the district court sanctioned the plaintiff's counsel for not avoiding the judiciary by a pre-suit demand."); *Roldan v. Pure Air Solutions, Inc.*, No. 07-22203-Civ, 2010 WL 410571, at *3 (S.D. Fla. Jan. 29, 2010) (citing *Sahyers* and commenting that "whether or not such an outcome [of no fee as a reasonable fee] amounts to judicial policy-making in the face of clear statutory language, we are bound by it"); *Glenwood Farms, Inc. v. Cozen O'Connor*, 666 F.Supp.2d 154, 179 (D. Me. 2009)

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and is very likely to become a leading inherent powers and mandatory attorney's fees case. This will disrupt congressional authority, allow special treatment for law firms under a facially neutral statute, and empower courts to disregard statutory mandates to promote civility among the bar at large.

This Court has regularly taken inherent authority cases to normalize the procedures of the federal courts and to prevent the "danger of overreaching when one branch of Government,

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(citing *Sahyers* for the proposition that a "federal court's control over a lawyer who practices before it derives from the lawyer's role as an officer of the court"); *Thomas v. Thistledown, Inc.*, No. 1:05-CV-02138, 2009 WL 3172881, at *13 (N.D. Ohio Sept. 29, 2009) (citing *Sahyers* for the proposition that a "lawyer's duties as a member of the bar-an officer of the court-are generally greater than a lawyer's duties to the client"); *Zuleta v. Prof'l Team Paint, Inc.*, No. 6:08-cv-1950-Orl-31DAB, 2009 WL 4855577, at *2 n.2 (M.D. Fla. Dec. 10, 2009) (citing *Sahyers* and providing that no fee may be a reasonable fee under the FLSA); *Mora v. Cemex, Inc.*, No. 6:08-CV-954-ORL-19DAB, 2009 WL 3231466, at *3 (M.D. Fla. Sept. 29, 2009) (same); *Kerpan v. Biscuits Cafe, Inc.*, No. 08-CV-811-ST, 2009 WL 1813147, at *7 (D. Or. June 23, 2009) (citing *Sahyers*, recognizing that "the district court denied a request for attorney fees to a paralegal . . . because her attorney gave his fellow lawyers no notice by telephone, email, or letter of her claim and made no effort to resolve the dispute before filing suit," and declining to apply *Sahyers* because the current case did not involve lawyers as parties); *Varela v. Innovative Wiring Solutions, LLC*, No. 6:07-cv-165-Orl-28KRS, 2009 WL 1795044, at *5 (M.D. Fla. June 22, 2009) (citing *Sahyers* and providing that no fee may be a reasonable fee under the FLSA); *Kwasnik v. Charlee Family Care Servs. of Cent. Fla., Inc.*, No. 6:08-cv-926-Orl-31KRS, 2009 WL 1607809, at *12 (M.D. Fla. June 9, 2009) (same).

without benefit of cooperation or correction from the others, undertakes to define its own authority." *Degen* 517 U.S. at 823. The Eleventh Circuit's requirement that Congress "specifically, explicitly and directly" abrogate a court's inherent powers with "very clear words" opens a conflict with the decisions of this Court and at least five other Circuit courts who hold that an exercise of inherent power is invalid if it contravenes clear language in a federal statute or rule. The otherwise unreviewable nature of inherent powers necessitates review in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-10848

D. C. Docket No. 07-00052-CV-T-30-MAP

CHRISTINE SAHYERS,
on behalf of herself and others
similarly situated,

Plaintiff-Appellant-
Cross-Appellee,

versus

PRUGH, HOLLIDAY & KARATINOS, P.L.,
a Florida Limited Liability Corporation,
TIMOTHY F. PRUGH
JAMES W. HOLLIDAY, II,

Defendants-Appellees,

THEODORE E. KARATINOS,

Defendant-Appellee-
Cross-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

(March 3, 2009)

Before EDMONDSON, Chief Judge, TJOFLAT, Circuit Judge, and RYSKAMP,* District Judge.

EDMONDSON, Chief Judge:

This appeal is about the power of a district court to supervise the work of the lawyers who practice before it. Christine Sahyers (Plaintiff) appeals a district court order denying her request for attorney's fees and costs in her lawsuit under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19. We affirm the order.

Background

Plaintiff worked as a paralegal at the law firm Prugh, Holliday & Karatinos, P.L. After she left the firm, she retained her own lawyer. Then she sued Prugh, Holliday & Karatinos, P.L. and its named partners (Defendants) for alleged violations of the overtime provisions of the FLSA; she claimed that she was not paid appropriately – at a rate at least 1.5 times her straight-time rate – for hours worked in excess of 40 per workweek. Before filing the suit, Plaintiff made no written demand for payment on Defendants; and her lawyer – before filing the complaint – made no attempt to inform Defendants of her claim or to collect any of the allegedly outstanding

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* Honorable Kenneth L. Ryskamp, United States District Judge for the Southern District of Florida, sitting by designation.

sums from them. Plaintiff had instructed her lawyer just to file suit, which he did. Defendants timely answered the complaint and denied all liability.

The complaint set forth only a generic request for damages: no specific dollar amount was demanded. So Defendants served discovery on Plaintiff that asked her to disclose the total number of overtime hours she allegedly worked without sufficient pay and all evidence supporting that calculation. Plaintiff, however, objected to those requests and repeated that she worked in excess of 40 hours per workweek and wanted payment for it. Defendants also engaged in settlement discussions. But those talks proved unhelpful, as Plaintiff asked for significant money damages[1] without offering proof of the amount Defendants actually owed to her.

Sometime after discovery closed, Defendants tendered an offer of judgment under Federal Rule of Civil Procedure 68 for $3,500 plus any attorney's fees and costs to which the district court determined Plaintiff was entitled. Defendants denied all liability in the Rule 68 offer.[2] Plaintiff accepted the Rule 68

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[1] The parties dispute the amount of Plaintiff's lowest settlement demand. Defendants contend that it was $35,000, while Plaintiff believes it was around $25,000. In either case, the demand was far in excess of the final settlement amount.

[2] The Rule 68 offer contained this language: "This Offer does not in any way act as an admission of liability or wrongdoing on the part of the Defendants. Likewise, the Plaintiff's acceptance of this Offer does not in any way act as an admission of liability or wrongdoing on the part of the Defendants."

offer. The district court entered judgment in favor of Plaintiff and afforded her an opportunity to file a motion for attorney's fees and costs.

Plaintiff, through her lawyer, timely moved for her litigation expenses. She asked the district court to award her $13,800 in attorney's fees and $1,840.70 in costs. Defendants objected.

On its own initiative, the district court scheduled oral argument on the issue. At that hearing, the district court asked Plaintiff's lawyer, among other things, to respond to Defendants' contention that he afforded Defendants no notice of Plaintiff's claim before filing suit. Plaintiff's lawyer admitted that the allegation was true. The lawyer's sole explanation was that he was only following the instructions of his client. After reviewing the parties' briefs and hearing oral argument (allowing the district court to interrogate Plaintiff's lawyer and to observe his demeanor), the district court concluded that Plaintiff had prevailed in the civil action. But the district court denied attorney's fees and costs. The district court wrote that "there are some cases in which a reasonable fee is no fee" and found that this case was such a case. This appeal followed.

Standard of Review

We review the issuance of sanctions and the denial of a request for attorney's fees and costs for abuse of discretion. *Mut. Serv. Ins. Co. v. Frit Indus.*,

Inc., 358 F.3d 1312, 1326 (11th Cir. 2004); *Johnson v. Florida*, 348 F.3d 1334, 1350 (11th Cir. 2003).

Discussion

In general, a prevailing FLSA plaintiff is entitled to an award of some reasonable attorney's fees and costs. 29 U.S.C. § 216(b); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223 n.12 (11th Cir. 2007); *Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1542 (11th Cir. 1985). But the district court treated this case as an exception to that rule by finding that a reasonable fee and cost award here was zero. The district court, in substance, based this exception on its inherent powers to supervise the conduct of the lawyers who come before it and to keep in proper condition the legal community of which the courts are a leading part. Plaintiff criticizes this decision as an abuse of discretion. We disagree.[3]

That federal courts are accorded certain inherent powers is well-established. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2132, (1991). Those powers are not governed by rule or by statute, "but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 82 S. Ct. 1386, 1389, (1962). Because of the potency of

[3] We will assume for the sake of discussion that Plaintiff is a prevailing party.

those powers, they must be "exercised with restraint and discretion." *Chambers*, 111 S. Ct. at 2132.

A federal court may wield its inherent powers over the lawyers who practice before it. This control derives from a lawyer's role as an officer of the court.[4] *Theard v. United States*, 77 S. Ct. 1274, 1276, (1957). It encompasses, among other things, the authority to police lawyer conduct and to guard and to promote civility and collegiality among the members of its bar.[5] *See, e.g., Chambers*, 111 S. Ct. at 2132 ("[A] federal court has the power to control admission to its bar and to discipline attorneys who appear before it."); *In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir. 1990); (court has power to supervise professional conduct of lawyers who practice before it).

In exercising its powers, a court need not free a client from the acts of his lawyer, especially when the client is aware of or directs those acts. *See Jochum v.*

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[4] As Justice Cardozo (then-Chief Judge of the New York Court of Appeals) once observed: "Membership in the bar is a privilege burdened with conditions. [A lawyer is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71 (1928).

[5] We believe and defend the idea that maintaining a bar that promotes civility and collegiality is in *the public interest* and greatly advances judicial efficiency: better "to secure the just, speedy and inexpensive determination of every action and proceeding," as Rule 1 demands. For background, see Fed. R. Civ. P. 1.

Schmidt, 570 F.2d 1229, 1232 n.5 (5th Cir. 1978) ("[F]ailing to impose sanctions [ ] merely because the plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer on the defendant.") (internal quotation marks omitted); *Anderson v. United Parcel Serv.,* 915 F.2d 313, 316 (7th Cir. 1990) ("There is no injustice in holding a client responsible for acts of his attorney of which he is aware."). A court, therefore, may deny an award of litigation expenses to which a client is otherwise entitled. *See Litton Sys., Inc. v. Am. Tel. & Tel. Co.,* 700 F.2d 785, 827-28 (2d Cir. 1983).

The district court's inherent powers support its decision here.[6] Defendants are lawyers and their law firm. And the lawyer for Plaintiff made absolutely no effort-no phone call; no email; no letter – to inform them of Plaintiff's impending claim much less to resolve this dispute before filing suit. Plaintiff's lawyer slavishly followed his client's instructions and – without a word to Defendants in advance – just sued his fellow lawyers.[7] As the district court saw it,

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[6] Congress was aware of the inherent powers of a federal court when enacting the FLSA. *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 325, (1990) ("We assume that Congress is aware of existing law when it passes legislation."). And at least in the absence of very clear words from Congress, we do not presume that a statute supersedes the customary powers of a court to govern the practice of lawyers in litigation before it.

[7] This explanation counts for little: a lawyer's duties as a member of the bar – an officer of the court – are generally

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this conscious disregard for lawyer-to-lawyer collegiality and civility caused (among other things) the judiciary to waste significant time and resources on unnecessary litigation and stood in stark contrast to the behavior expected of an officer of the court.[8] The district court refused to reward – and thereby to encourage – uncivil conduct by awarding Plaintiff attorney's fees or costs. Given the district court's power of oversight for the bar, we cannot say that this

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greater than a lawyer's duties to the client. *See Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir. 1993) ("An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself."); *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1327 (11th Cir. 2002) ("Independent judgment is an essential ingredient of good lawyering, since attorneys have duties not only to their clients, but also, as officers of the court, to the system of justice as a whole.") (internal quotation marks omitted). Plaintiff's lawyer showed little concern for the district court's time and energy and no courtesy to his fellow lawyers.

[8] The customs of professional courtesy were important to the district court. In its written order, the district court used these words: "This Court is not ruling that a pre-suit letter is always required, but in this case, the Plaintiff's lawyer did not even make a phone call to try to resolve the issue before filing suit. The Defendant is a law firm. Prior to filing suit in this local area, it is still reasonable to pick up the phone and call another lawyer so it won't be necessary to file suit. The defense proffered by Plaintiff's lawyer for not doing so is that his client instructed him to file suit first and ask questions later. . . . [T]he Court reminds him that the lawyer is the officer of the Court, not the client. This [C]ourt will not permit lawyers to file unnecessary litigation and palm it off on their clients."

decision was outside of the bounds of the district court's discretion.[9]

We strongly caution against inferring too much from our decision today. These kinds of decisions are fact-intensive. We put aside cases in which lawyers are not parties. We do not say that pre-suit notice is usually required or even often required under the FLSA to receive an award of attorney's fees or costs. Nor do we now recommend that courts use their inherent powers to deny prevailing parties attorney's fees or costs. We declare no judicial duty. We create no presumptions. We conclude only that the district court did not abuse its discretion in declining to award some attorney's fees and costs based on the facts of this case.

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[9] We have said that a court may not sanction a lawyer under its inherent powers absent a showing "that the lawyer's conduct constituted or was tantamount to bad faith." *Thomas*, 293 F.3d at 1320 (internal quotation marks omitted). We have assumed that awarding no attorney's fees and costs constitutes some informal sanction. Nevertheless, even if bad faith is required, we conclude that the conscious indifference to lawyer-to-lawyer collegiality and civility exhibited by Plaintiff's lawyer (per his client's request) amounted to harassing Defendants' lawyers by causing them unnecessary trouble and expense and satisfied the bad-faith standard.

Conclusion

We affirm the order of the district court.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHRISTINE SAHYERS,

Plaintiff,

v.

PRUGH, HOLLIDAY & KARATINOS, et.al.,

Case No. 8:07-cv-52-T-30MAP

Defendants.

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ORDER

(Filed Feb. 1, 2008)

THIS CAUSE comes before the Court upon Plaintiff's Motion to Tax Attorney's Fees and Expenses (Dkt. 19), and the Responses (Dkts. 21 and 22) filed in opposition to the same by Defendants, Prugh, Holliday & Karatinos, PL., Timothy F. Prugh, James W. Holliday, II, and Theodore Karatinos (collectively, "Defendants"). The Court, having reviewed the motions, responses, and supporting documentation, and having heard oral argument from the parties on January 24, 2007, determines that Plaintiff's Motion should be denied.

On October 5, 2007, upon notice that Plaintiff had accepted Defendants' Offer of Judgment, the Court entered final judgment against Defendants in the total amount of $3,500.00. The Court granted Plaintiff twenty days to file a motion for attorneys

fees and costs. On October 25, 2007, Plaintiff filed the instant motion seeking $15,640.70 in fees and costs.

Defendants argue that Plaintiff is not entitled to fees and costs because she is not a prevailing party in this action, and thus not entitled to attorney's fees under the Fair Labor Standards Act, as amended, 29.U.S.C. § 201 *et seq.* (the "FLSA"). Defendants claim that by accepting a non-liability term contained in the Offer of Judgment, the Plaintiff agreed that Defendants were not liable for any wrongdoing. Moreover, Defendants claim that the Court's entry of judgment was not a judgment on the merits of Plaintiff's case, and that the legal relationship of the parties was not changed as a result.

The Court disagrees. In *Utility Automation 2000, Inc. v. Choctawhatchee Elec. Co-op. Inc.*, 298 F.3d 1238, 1239 (11th Cir. 2002), a plaintiff accepted the defendants' offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure. The district court entered final judgment, and the plaintiff moved for attorney's fees, costs, and expenses incurred prior to service of the offer of judgment. *Id.* at 40. The district court granted the plaintiff's request for fees, but denied the request for costs because the underlying statute did not define costs to include attorney's fees. *Id.*

On appeal, the Eleventh Circuit considered (i) whether the offer of judgment unambiguously included attorney's fees, (ii) whether fees were available as "costs accrued" under Rule 68, or (iii) whether fees

were available pursuant to any other relevant authority. *Id.* at 1243-44. Only the third question is relevant to the instant case.[1]

The plaintiff in *Utility Automotion* had filed suit, at least in part, to enforce the terms of a contract. *Id.* at 1248. The underlying contract provide for the award of attorney's fees to the "prevailing party" in any action to enforce the agreement. Thus, the Eleventh Circuit examined whether the plaintiff was a "prevailing party," and thus entitled to attorney's fees based on the contact. Noting that an offer of judgment "falls somewhere between a consent decree and the minimalist 'catalyst theory' the [Supreme Court] rejected in *[Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health and Human Res.*, 532 U.S. 598 (2001)]," the Eleventh Circuit stated that a Rule 68 judgment represents a "judicially sanctioned change in the relationship between the parties." *Id.* While the judgment in the instant case does not include an injunction, as did the judgment in *Utility Automation,* the Court concludes that Plaintiff is nevertheless a prevailing party under the FLSA.

The Court notes that the FLSA provides for a mandatory award of reasonable attorney's fees. 29 U.S.C. § 216(b). Nevertheless, there are "special

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[1] Defendants' Offer of Judgment did not unambiguously include attorneys fees, and the FLSA does not define costs to include attorney's fees. Thus, the first two questions are not relevant to the instant case.

circumstances" that can render such an award of attorney's fees unjust. *Goss v. Killian Oaks House of Learning*, 248 F. Supp. 2d 1162, 1168 (S.D. Fla. 2003). So called nuisance settlements represent such a circumstance. *Id.* Put another way, there are some cases in which a reasonable fee is no fee. Upon hearing oral argument of the parties, the Court concludes that this case is such a circumstance.

At no time prior to filing this lawsuit did Plaintiff make a written demand to Defendants for payment of the overtime compensation she now seeks. Furthermore, Plaintiff's attorney did not send Defendants a pre-suit demand letter prior to filing this lawsuit. This Court is not ruling that a pre-suit letter is always required, but in this case, the Plaintiff's lawyer did not even make a phone call to try to resolve the issue before filing suit. The Defendant is a law firm. Prior to filing suit in this local area, it is still reasonable to pick up the phone and call another lawyer so it won't be necessary to file suit. The defense proffered by Plaintiff's lawyer for not doing so is that his client instructed him to file suit first and ask questions later.

This problem is not uncommon. In the context of an ADA rather than FLSA claim, Judge Presnell has noted:

> One might reasonably ask whether attorney's fees should be awarded where no effort is made pre-suit to obtain voluntary compliance. After all, if the litigation achieves no result other than that which could be

> accomplished by agreement, what social or economic value has been added by the lawyer's decision to file a suit without warning? Indeed, under this scenario, it would seem that litigation carries only negative economic value-it has accomplished nothing but expense and waste of precious judicial resources.

Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1282 n. 14 (M.D.Fla. 2004).[2] Absent any pre-suit demand, a defendant who unknowingly failed to compensate an employee for overtime would have no opportunity to voluntarily do so outside of litigation. As a result, such a defendant would be subject to additional litigation expenses and attorney's fees despite its good faith desire to properly compensate the employee. Furthermore, additional judicial time and resources would be spent on unnecessary litigation.

As Judge Moreno ruled in *Goss*, an FLSA case, the Court concludes that it would be unreasonable and unjust to force Defendants to pay any of Plaintiff's attorney's fees.[3] This Court refuses to reward unnecessary litigation. For the same reason, the

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[2] The Courts notes that the award of attorneys fees under the ADA is not mandatory.

[3] Judge Moreno further noted that the "strategy of 'shaking down' Defendants with nightmarishly expensive litigation solely in pursuit of attorney's fees must not be rewarded." *Goss*, 248 F. Supp. 2d at 1169. While the facts in the instant case are not as egregious as those in *Goss*, the underlying principle is the same.

Court also denies Plaintiff's request for reasonable costs and/or expenses. *See Goss*, 248 F. Supp. 2d. at 1169 (noting the district court has discretion to deny costs to a prevailing party provided it specifies the specific reasons for denying such costs). Despite the claim made by Plaintiff's counsel that his client did not want him to make a pre-suit demand, the Court reminds him that the lawyer is the officer of the Court, not the client. This court will not permit lawyers to file unnecessary litigation and palm it off on their clients.

It is therefore ORDERED AND ADJUDGED that

1. Plaintiff's Motion to Tax Attorney's Fees and Expenses (Dkt. 19) is **DENIED**.

2. All pending motions are denied as moot. The Clerk is directed to close this file.

DONE and **ORDERED** in Tampa, Florida on February 1, 2008.

/s/ James S. Moody, Jr.
JAMES S. MOODY, JR.
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record
S:\Even\2007\07-cv-52.mt attorney fees.frm

603 F.3d 888

United States Court of Appeals,
Eleventh Circuit.
Christine SAHYERS, on behalf of herself
and others similarly situated,
Plaintiff-Appellant-Cross-Appellant,
v.
PRUGH, HOLLIDAY & KARATINOS, P.L. a Florida
Limited Liability Corporation, Timothy F. Prugh,
James W. Holliday, II, Defendants-Appellees,
Theodore E. Karatinos, Defendant-Appellee-
Cross-Appellant.
No. 08-10848.

April 14, 2010.

Ryan David Barack, Kwall, Showers & Barack, P.A., Clearwater, FL, for Sahyers.

Thomas M. Gonzalez, Jennifer L. Watson, Thompson, Sizemore, Gonzalez & Hearing, P.A., Tampa, FL, Nocholas E. Karatinos, Lutz, FL, for Defendants-Appellees.

Sam J. Smith, Burr & Smith, LLP, Tampa, FL, for Amicus Curiae.

Appeal from the United States District Court for the Middle District of Florida (No. 07-00052-CV-T-30-MAP); James S. Moody, Jr., Judge.

Before DUBINA, Chief Judge, and TJOFLAT, EDMONDSON, BIRCH, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON, PRYOR and MARTIN, Circuit Judges.

ORDER:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure), the Suggestion of Rehearing En Banc is DENIED.

EDMONDSON, Circuit Judge, concurring in denial of en banc rehearing:

Decisions on whether or not to grant en banc rehearing are not decisions on the merits of the appeal. As I understand it, the only judges of this Court who have had the merits of this case put before them for decision are the members of the panel who decided the case. Nevertheless, it, in the past dozen years or so, has become the fashion – moving from the exceptional to the normal – of our Court for some judges, who were not on the pertinent panel, to file dissents regularly when en banc rehearing is denied. The dissents almost always dwell on their view of the incorrectness of the merits decision by the panel. The writing of the dissents, the reading of the dissents, and the replying to the dissents all consume judicial time and energy that are limited commodities. I am not sure what the utility of this new practice is. For example, as near as I can tell, nothing indicates that dissents filed on denials of en banc rehearing make it more likely that the Supreme Court will grant

certiorari in a case of our Court. Still, I do not question the power of my colleagues to file dissents in these circumstances; and I do appreciate that, at times, it feels good to say one's piece. (On en banc denials, I have dissented a time or two myself over the decades.) But I do wonder about the cost-benefit analysis on the whole for the law, for the Court, and for the Country of *regular* dissents to denials of en banc rehearing.

About this case, I have a few observations to make. Lawyers, as members of the Courts' Bars (that is, as officers of the Courts) are often, and in a variety of ways, treated by the Courts better or worse than nonlawyers. I stress that I do not see the Courts' inherent powers to supervise the members of their Bars as "overriding" (that is, cancelling) the FLSA statute's treatment of fees. The statute is law, general law tied to the ***outcome*** of FLSA suits.

I see the Courts' inherent powers over Bar members as a separate and *pre-existing* font of law and legal authority that specifically governs the ***conduct*** of lawyers as lawyers, regardless of the ***outcome*** of the case: the law of inherent powers supplements the FLSA statute to make up the whole of the applicable law in this case. Therefore, I see the whole applicable law to run this way: When the ***outcome*** favors the plaintiff, fees shall be awarded *unless* the District Court, in the reasonable exercise of its power to supervise lawyers in their practice in cases before the Court, determines that an award of fees (given the specific circumstances of a particular

case) is not right – not right directly because of lawyer ***conduct*** related to the specific case. Thus, fees nearly always are to be awarded; but never are the Courts altogether stripped of the power to supervise lawyer conduct through the grant or withholding of fees.

That Courts have the inherent and main – if not exclusive – authority (along with the duty and responsibility) to supervise their Bar members is, I believe, no innovative idea. And that Courts can use the control of attorney fees as a means of exercising the inherent power to supervise lawyer conduct in particular cases seems uninnovative too. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 2133, 115 L.Ed.2d 27 (1991) (court may per inherent power assess attorneys fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive purposes); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (federal courts have inherent powers to assess attorneys fees against counsel).

The inherent powers to supervise lawyers are important to the Courts. I suggest that Courts ought to be highly reluctant to cede this traditional power dealing with control of lawyer conduct in respect to cases that come before the Courts: reluctant for practical reasons touching upon the best interest of the judicial system, Bar, and public as well as reluctant for important separation-of-powers reasons. But I do assume that Congress could abrogate the Courts' inherent power to control (that is, control by

governing fee awards) lawyers' conduct, if Congress did so specifically, explicitly, and directly. Nevertheless, abrogation is not what has happened in the FLSA, as I understand it.

Congressional abrogation of traditional Court powers ought not to be lightly assumed. And I maintain it is by no means clear that Congress intended that the FLSA in any way interfere with the Courts' traditional supervisory powers over the course of litigation and over lawyer conduct, although Congress did intend for fees to be assessed against defendants ordinarily when the plaintiff obtains a winning outcome. I believe I am correct to say that Congressional abrogation of the Court's inherent power to supervise lawyer conduct must be clear and plain, before the Courts let that critical power get away. *See Chambers*, 111 S.Ct. at 2134-36 (requiring a much clearer expression of purpose than the creation of an express rule on a similar subject for a court to assume Congress intended to abrogate inherent judicial power).

About this case in particular, I will not repeat everything that I set out in the panel opinion. People who are interested can check for themselves about what the panel said and did. The case is intensely fact specific. The appellate decision creates no procedural rule. The panel created no procedural rule requiring pre-suit notice in FLSA cases: even notices from suing lawyers to lawyers to be sued in their individual capacity. Nor do I understand the District Court to have created such a hard-edged rule even for

lawyers suing lawyers, although the absence of any notice was obviously an important consideration in the fee determination, particularly given all the circumstances (no looming statute of limitations, no concerns about a fleeing defendant, the local litigation customs among lawyers, the difficulty in determining what plaintiff claimed she was owed, the small settlement, and so on).

As the Preamble to the Rules Regulating the Florida Bar observes, a lawyer should demonstrate respect for other lawyers. Given that the defendants in this case were a law firm and lawyers sued individually by a plaintiff represented by a lawyer from the same local area, the District Court in this case was attempting to supervise its Bar and to protect civility and respect among the area's lawyers. The District Judge specifically tied his decision to the local practices: "prior to filing suit in this local area, it is still reasonable to pick up the phone and call another lawyer so it won't be necessary to file suit." Other district judges in other areas of our Circuit may have different views based upon different local circumstances. Please recall that, even under Rule 11 (another kind of lawyer-conduct regulation), the district judge's knowledge of the "local bar's litigation practices" is considered an important reason for giving district judges much leeway on matters of sanctions. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2460, 110 L.Ed.2d 359 (1990).

While I promised that I would not repeat everything I said in the panel opinion, I will end by repeating footnote 5 from the panel opinion: "We believe and defend the idea that maintaining a bar that promotes civility and collegiality is *in the public interest* and greatly advances judicial efficiency: better 'to secure the just, speedy and inexpensive determination of every action and proceeding,' as Rule 1 demands. For background, see Fed.R.Civ.P. 1."

BARKETT, Circuit Judge, dissenting:

En banc review is warranted in this case because district courts do not have the power, inherent or otherwise, to directly contravene a federal statute. The panel decision, holding that the district court could deny attorneys' fees mandated by the Fair Labor Standards Act ("FLSA"), is contrary to settled United States Supreme Court precedent providing that the use of a district court's inherent supervisory powers is invalid when it conflicts with a statutory command. *See, e.g. Bank of Nova Scotia v. United States,* 487 U.S. 250, 254, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988); *Thomas v. Arn,* 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). As Judge Wilson notes in his dissent, there is no dispute that the language of the statute is mandatory, *see* 29 U.S.C. § 216(b) ("The court in such action shall, in addition to any judgment awarded to plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."), and has been

previously so construed by our court. *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223 n. 12 (11th Cir.2007).

The panel characterizes the denial of attorneys' fees as an informal sanction of Sahyers' lawyer for suing fellow lawyers without first attempting to resolve the dispute through informal means. In his concurrence to the denial of rehearing, Judge Edmondson stresses that the district court based its decision on local litigation customs and practices, but the district court opinion references no such customs or practices. The district court simply says that, in *its* view, it is "reasonable" to call another lawyer prior to filing suit. That is not enough to give notice to Sahyers' attorney. District courts do not have the authority to sanction lawyers for conduct not proscribed by law or rule – which is the case here – without first providing them with notice that their conduct may warrant sanctions. Fed.R.Civ.P. 83(b) ("No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement."). Because Sahyers' attorney was given no *actual notice,* the district court had no authority to sanction him for failing to contact the defendants or their lawyers before filing suit. *See In re Mroz,* 65 F.3d 1567, 1575 (11th Cir.1995) ("Due process requires that the attorney (or party) be given fair notice that his conduct may warrant sanctions and the reasons why." (citation omitted)). Accordingly, there is no authority

for disregarding the mandatory language of FLSA on this basis.

The panel's only supporting authority for its contention that a court may deny an award of litigation expenses to which a client is otherwise entitled by law is *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir.1983). However, that decision does not permit a district court to simply disregard the express language of a statute that mandates attorneys' fees and costs. Rather, it affirms a sanction imposed under Federal Rule of Civil Procedure 37 for "gross negligence" and "willful misconduct" by the plaintiff's lawyers. *Id.* at 826-28. The failure to notify an opposing lawyer prior to suit in the absence of any known requirement to do so can hardly qualify as negligence or willful misconduct.

Because the panel opinion disregards the express mandate of Congress, this case warrants *en banc* review.

WILSON, Circuit Judge, dissenting:

The Court affirms a decision by a district court that denies a prevailing plaintiff's lawyer his entitlement to an attorney's fee under the Fair Labor Standards Act ("FLSA") on account of his failure to give the defendant, a lawyer, advance notice of the lawsuit. I am concerned about the precedent this case sets. First, an award of attorneys' fees to a prevailing party is mandatory under the FLSA. Second, I have

found no authority that requires plaintiff's counsel to provide pre-suit notice when another lawyer is the defendant. Although well-intentioned, I doubt that the federal courts have the inherent authority to ignore and override a statutory mandate in the interest of promoting a professional courtesy. I also do not believe that Congress intended to single out lawyers for exclusive treatment under the FLSA. Since it is now within the inherent authority and discretion of the district courts in our Circuit to hold that no attorney's fee is a reasonable fee when no pre-suit notice is extended to defendants who are lawyers, I would consider this case en banc before permitting this new Circuit precedent to stand.

The facts are these. Plaintiff Christine Sahyers worked as a paralegal for the defendant law firm Prugh, Holliday & Karatinos, P.L. On January 9, 2007, Sahyers filed a lawsuit against her former employer and its three owners and principals, Timothy F. Prugh, James W. Holliday, II, and Theodore Karatinos (collectively the "defendants"), pursuant to the FLSA to recover unpaid overtime compensation. The defendants filed an answer, denying liability. The case proceeded to discovery, and less than one month after a failed court-ordered mediation, the plaintiff accepted an offer of judgment pursuant to Federal Rule of Civil Procedure 68. The next day, the district court entered final judgment against the defendants in the amount of $3,500.

Thereafter, the plaintiff filed a motion for attorneys' fees and expenses, in which she sought

$15,640.70, comprised of $13,800 in attorneys' fees and $1,840.70 in costs. The district court determined that the plaintiff was a prevailing party under the FLSA. However, recognizing that the FLSA provides for a mandatory award of reasonable attorneys' fees, the district court was persuaded to conclude that this case presented "special circumstances" and decided that "a reasonable fee is no fee." *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, No. 8:07-cv-52-T-30MAP, slip op. at 3 (M.D.Fla. Feb. 1, 2008) ("District Court Order").

The district court found that the plaintiff subjected the defendants to "unnecessary litigation" and refused to reward such behavior because at no time prior to filing the lawsuit did the plaintiff or the plaintiff's attorney make a written demand for payment of the overtime compensation. *Id.* at 3-5. Further, the district court stressed that the plaintiff's attorney should have notified the defendant law firm, because prior to filing suit in the Middle District of Florida, "it is still reasonable to pick up the phone and call another lawyer so it won't be necessary to file suit." *Id.* at 4. The district court dismissed the plaintiff's counsel's claim that his client did not want him to make a pre-suit demand, "remind[ing] [plaintiff's counsel] that the lawyer is the officer of the Court, not the client." *Id.* at 5. The plaintiff appealed the denial of attorneys' fees and costs, and defendant Karatinos cross-appealed the district court's determination that the plaintiff was a prevailing party.

With the benefit of oral argument, the *Sahyers* opinion affirmed. The *Sahyers* opinion framed the issue in this way: "This appeal is about the power of a district court to supervise the work of the lawyers who practice before it." *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 1243 (11th Cir.2009). The *Sahyers* opinion construed the District Court Order as creating an "exception" to the FLSA's mandatory fee statute based on the district court's "inherent powers to supervise the conduct of the lawyers who come before it and to keep in proper condition the legal community of which the courts are a leading part." *Id.* at 1244. It explained that "at least in the absence of very clear words from Congress, we do not presume that a statute supersedes the customary powers of a court to govern the practice of lawyers in litigation before it." *Id.* at 1245 n. 6. I disagree – well-settled Supreme Court precedent rejects the *Sahyers* opinion's "very clear words" standard.

"In the exercise of its supervisory authority, a federal court 'may, *within limits*, formulate procedural rules not specifically required by the Constitution or the Congress.'" *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988) (quoting *United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983)) (emphasis added). One of those limits on a federal court is when Congress has spoken: "[e]ven a sensible and efficient use of [a court's] supervisory power, however, is invalid if it

conflicts with constitutional or statutory provisions." *Thomas v. Arn*, 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). "A contrary result 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'" *Id.* (quoting *United States v. Payner*, 447 U.S. 727, 737, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980)). Applied here, the *Sahyers* opinion's denial of attorneys' fees and costs as an exercise of its supervisory authority over the practice of lawyers conflicts with the plain language of the FLSA.

The FLSA is a mandatory fee statute, and we have not recognized any exception to it. "The court in such action *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b) (emphasis added). The Supreme Court, our Circuit, and our sister circuits have consistently interpreted § 216(b) as mandatory.[1] We have gone so far as to declare

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[1] *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415 & n. 5, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (referring to § 216(b) of the FLSA as one of the "statutes [that] make fee awards mandatory for prevailing plaintiffs"); *Singer v. City of Waco*, 324 F.3d 813, 829 n. 10 (5th Cir.2003) ("The FLSA requires an employer who violates the statute to pay attorney's fees."); *Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 406 (7th Cir.1999) ("While the award of fees [under the FLSA] is mandatory, the district court has 'wide latitude' in determining the amount of the fee.") (citation omitted); *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir.1994) ("An award of attorney fees to a prevailing plaintiff under § 16(b) of the FLSA is mandatory, but

(Continued on following page)

expressly that "[p]revailing plaintiffs are *automatically entitled* to attorneys' fees and costs under the FLSA." *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223 n. 12 (11th Cir.2007) (emphasis added).

In a perfect world, a lawyer who files a lawsuit against another lawyer would first attempt to resolve the matter outside the courthouse. Such a practice is both sensible and efficient. However, a procedural rule that in effect mandates pre-suit notice is invalid if it conflicts with a statutory provision. The Court's opinion in effect reads a requirement of pre-suit

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the amount of the award is within the discretion of the judge.") (citation omitted); *Shelton v. Ervin*, 830 F.2d 182, 184 (11th Cir.1987) ("Section 216 provides for an award of attorney's fees, *as opposed to granting the court discretion in awarding such fees*, to the prevailing plaintiff in FLSA cases.") (emphasis added); *Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1542 (11th Cir.1985) ("Section 216(b) of the Act makes fee awards mandatory for prevailing plaintiffs."); *Burnley v. Short*, 730 F.2d 136, 141 (4th Cir.1984) ("The payment of attorney's fees to employees prevailing in FLSA cases is mandatory. The amount of the attorney's fees, however, is within the sound discretion of the trial court.") (internal citation omitted); *Graham v. Henegar*, 640 F.2d 732, 736 n. 8 (5th Cir. Unit A Mar.1981) ("[A]n award of attorney's fees to a prevailing plaintiff in an FLSA suit is mandatory."); *Wright v. Carrigg*, 275 F.2d 448, 449 (4th Cir.1960) ("With respect to the counsel fee [pursuant to § 216(b)], the court had no discretion to deny it; the law's requirement of an award is mandatory and unconditional."); *Murray v. Playmaker Servs., LLC*, 548 F.Supp.2d 1378, 1381 (S.D.Fla.2008) (Ryskamp, J.) (providing that the FLSA "*directs* district courts to award reasonable attorney's fees and costs to a plaintiff, in addition to any judgment received") (emphasis added).

notice into § 216(b) of the FLSA, at least where a law firm or lawyer is a defendant, thereby "confer[ring] on [itself] discretionary power to disregard the considered limitations of the law it is charged with enforcing." *Arn*, 474 U.S. at 148, 106 S.Ct. 466 (quoting *Payner*, 447 U.S. at 737, 100 S.Ct. 2439). Although a legislature can make pre-suit notice mandatory when it chooses, that circumstance does not apply here. *See, e.g.*, Fla. Stat. § 766.106(2)(a) (providing that "prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant"). While it is desirable to encourage lawyer collegiality and to discourage unnecessary litigation, I do not believe that we can rewrite a statute to conform with certain policy preferences. *See Reeves v. Astrue*, 526 F.3d 732, 738 (11th Cir.2008) ("The Supreme Court has advised that whatever merits . . . policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them.") (quotation marks, alteration, and citation omitted). The *Sahyers* opinion provides binding precedent for a district court to ignore a clear Congressional mandate from a federal statute based on its "inherent powers." Such precedent oversteps the boundaries of our proper duty as neutral arbiters and obviates the role of Congress. My discussion could end here, as the plaintiff was the prevailing party, and the FLSA's plain language is controlling.

Moreover, I also disagree with the Court's statement that "a lawyer's duties as a member of the bar – an officer of the court – are generally greater

than a lawyer's duties to the client." *Sahyers*, 560 F.3d at 1245 n. 7. It bears repeating that the *Sahyers* opinion failed to cite any statute, rule, local rule, or case from this Circuit, the Middle District of Florida, or elsewhere that even arguably imposes a duty on an attorney to contact prospective opposing counsel where that counsel represents a law firm or a lawyer. I can find no rule of professional responsibility that would place Sahyers' lawyer on notice that it is a breach of professional or ethical responsibility to file a lawsuit against a fellow lawyer without the courtesy of advance notice. Honorable though it may be, providing a lawyer-defendant with pre-suit notice in FLSA cases is neither a requirement, nor a breach of a lawyer's ethical responsibility.

I recognize that the appropriate balance between duty to a client and duty of candor to the court is certainly a difficult one to strike. In certain circumstances, a lawyer's duty to the court is "greater" than his or her duty to a client. However, while counsel owes a duty to the court, *context matters*. The plaintiff did *not* instruct her counsel to commit a crime, to perpetrate a fraud upon the court, or to file a frivolous lawsuit. Rather, the plaintiff merely instructed her counsel to file a lawsuit, which – considering the fact that defendants filed an answer as opposed to a motion to dismiss and ultimately offered judgment – appeared to have, at least, *some* merit. In fact, the Model Code of Professional Responsibility appears to require exactly what the plaintiff's counsel did – follow the client's

instructions: "[T]he lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." Model Code of Prof'l Responsibility EC 7-8 (1983); *see also id.* at EC 7-7 (providing that, except in areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, "the authority to make decisions is *exclusively* that of the client and, if made within the framework of the law, such decisions are *binding* on his lawyer") (emphasis added). Hence, not only is there no rule requiring plaintiff's counsel to give pre-suit notice to his fellow lawyers, plaintiff's counsel had an ethical duty to follow his client's instructions. In applying the *Sahyers* opinion's reasoning, however, a plaintiff's lawyer must ignore a client's explicit instruction to file an arguably meritorious lawsuit and must first give "word" by way of a phone call, e-mail, or letter before "su[ing] his fellow lawyers." This rule should not be the law.

The *Sahyers* opinion equated the conduct of the plaintiff's counsel to bad faith: "the conscious indifference to lawyer-to-lawyer collegiality and civility exhibited by Plaintiff's lawyer (per his client's request) amounted to harassing Defendants' lawyers by causing them unnecessary trouble and expense and satisfied the bad-faith standard." 560 F.3d at 1246 n. 9. It relies on *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir.1983), stating that "[a] court . . . may deny an

award of litigation expenses to which a client is otherwise entitled." *Sahyers,* 560 F.3d at 1245. As a threshold matter, *Litton Systems,* a Second Circuit opinion, is not binding precedent in this Circuit; it is merely persuasive authority. Additionally, *Litton Systems* does not stand for that broad proposition, and, even if it did, the facts of *Litton Systems* are so far removed from *Sahyers* that the former sheds no light on the latter. The *Litton* court merely affirmed a sanction pursuant to Federal Rule of Civil Procedure 37 finding "gross negligence" and "willful misconduct." Here, the district court did not impose any sanction and did not invoke Rule 37. Instead, it carved out a "special circumstances" exception to the FLSA. *See* District Court Order at 3. The only reason relied upon by the district court to award Sahyers "nothing" as an attorney's fee was the failure to extend the professional courtesy of pre-suit notice to a law firm. This conduct does not amount to bad faith.

Finally, I am troubled by the implication that lawyers are entitled to exclusive treatment under the FLSA. Although the *Sahyers* opinion states that it does not intend to create a new rule of pre-suit notice in FLSA cases where the defendant is a law firm or a lawyer, such language will surely fall on deaf ears in this Circuit (as it should) in light of the fact that *Sahyers* is a published opinion, which makes it binding precedent in this Circuit. *See* I.O.P. 2 to Fed. R.App. P. 36 ("Under the law of this circuit, published opinions are binding precedent."). Section 216(b) pays no attention to the occupation of the defendants.

Neither should we. The *Sahyers* opinion has unintentionally created a new rule that a plaintiff's failure to give pre-suit notice to a lawyer-defendant in an FLSA case may forfeit the plaintiff's otherwise statutory right to attorneys' fees and costs. Courts within this Circuit will rely on *Sahyers* and will interpret it as creating a discretionary exception to a mandatory fee statute. In point of fact, courts both within this Circuit and outside of this Circuit have already followed suit, recognizing, but not yet applying, the proposition that no fee can be a reasonable fee under the FLSA when a plaintiff fails to give pre-suit notice to a lawyer-defendant. *See Roldan v. Pure Air Solutions, Inc.*, S.D. Fla.2010, 2010 WL 410571, at *3 (No. 07-22203-Civ, Jan. 29, 2010) (citing *Sahyers* and commenting that "whether or not such an outcome [of no fee as a reasonable fee] amounts to judicial policy-making in the face of clear statutory language, we are bound by it").[2]

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[2] *See also Zuleta v. Prof'l Team Paint, Inc.*, M.D. Fla.2009, 2009 WL 4855577, at *2 n. 2 (No. 6:08-cv-1950-Orl-31DAB, Dec. 10, 2009) (citing *Sahyers* and providing that no fee may be a reasonable fee under the FLSA); *Mora v. Cemex, Inc.*, M.D. Fla.2009, 2009 WL 3231466, at *3 (No. 6:08-CV-954-ORL-19DAB, Sept. 29, 2009) (same); *Kerpan v. Biscuits Cafe, Inc.*, D. Or.2009, 2009 WL 1813147, at *7 (No. 08-CV-811-ST, June 23, 2009) (citing *Sahyers*, recognizing that "the district court denied a request for attorney fees to a paralegal . . . because her attorney gave his fellow lawyers no notice by telephone, email, or letter of her claim and made no effort to resolve the dispute before filing suit," and declining to apply *Sahyers* because it did not involve lawyers as parties); *Varela v. Innovative Wiring*

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Moreover, there is no indication in the record that plaintiff's counsel filed this lawsuit in an attempt to "shake down" the defendants for attorneys' fees and costs. The case settled *after discovery ended,* and the defendants made an offer of judgment only after they had the opportunity to look at the evidence. Any determination that the case would have settled if plaintiff's counsel sent a pre-suit notice to the defendants (based on the record as it appears before us) is pure speculation. In other words, pre-suit notice may not have made a difference. Moreover, at the motion hearing before the district court, Sahyers' counsel asserted that (1) Sahyers herself made a demand on the law firm prior to litigation, and (2) he lacked the records necessary to make a pre-suit demand before filing the lawsuit. Tr. of Jan. 24, 2008 Mot. Hr'g at 21:19-23 (arguing that had the defendants deposed Sahyers, "she would have testified that she did ask for her money"); *id.* at 22:12-18 (arguing that "[plaintiff's counsel] did not have access to [Sahyers'] time records").

While counsel's arguments are not evidence, an evidentiary hearing would prove or disprove these assertions. The district court made no specific factual

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Solutions, LLC, M.D. Fla.2009, 2009 WL 1795044, at *5 (No. 6:07-cv-165-Orl-28KRS, June 22, 2009) (citing *Sahyers* and providing that no fee may be a reasonable fee under the FLSA); *Kwasnik v. Charlee Family Care Servs. of Cent. Fla., Inc.,* M.D. Fla.2009, 2009 WL 1607809, at *12 (No. 6:08-cv-926-Orl-31KRS, June 9, 2009) (same).

findings based on any evidence regarding, for example, bad faith on behalf of the plaintiff or the necessity of the litigation. The *Sahyers* opinion relied solely on plaintiff's counsel's failure to give pre-suit notice. Since we have held that "an inquiry into a party's bad faith is best conducted by the district court," *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1438 (11th Cir.1998), I would at least have remanded this case back to the district court for an evidentiary hearing with instructions to engage in the lodestar analysis.

A district court retains the discretion to determine or to set a reasonable attorney's fee under the FLSA, but the district courts, in my view, lack the discretion to deny all fees and costs by way of a "special circumstances" exception to promote collegiality. I agree completely with the efforts of the distinguished district judge to seek to promote professionalism and civility in the practice of law. It is an important component of judicial administration. I also agree that this Court was well-intentioned in deferring to the district court's discretion; however, I fear that we went too far. My primary concern is with the precedent this case now creates: It is now within the discretion of district courts in our Circuit to deny attorney's fees to lawyers who fail to extend professional courtesies to lawyer-defendants in FLSA and (presumably other) civil rights cases. This new law will undoubtedly discourage public interest lawyers from taking these cases. Although the plaintiff prevailed in her FLSA claim, her lawyer was unable

to recover any fees or his client's costs as mandated by Congress. I would prefer that the full Court consider this appeal before creating this new precedent.